

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 05-0354
Sales and Use Tax
Tax Period 2002-2004

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ISSUES

I. Sales and Use Tax-Imposition

Authority: IC § 6-8.1-5-1(b); IC § 6-2.5-2-1(a); IC § 6-2.5-2-2;
IC § 6-8.1-5-4.

The taxpayer protested the imposition of sales tax.

II. Tax Administration- Ten Percent Negligence Penalty

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2 (b).

The taxpayer protested the imposition of the ten percent negligence penalty.

Statement of Facts

The taxpayer is a vendor of food and drinks at an annual festival. After an audit, the Indiana Department of Revenue (department) assessed additional sales tax, penalty, and interest against the taxpayer for the tax period 2002-2004. The taxpayer protested this assessment. A hearing was held and this Letter of Findings results.

I. Sales and Use Tax-Imposition

Discussion

Indiana imposes a sales tax on the transfer of tangible personal property in a retail transaction. IC § 6-2.5-2-1(a). The sales tax to be remitted to the state is computed by multiplying the total sales by the sales tax rate. IC § 6-2.5-2-2.

Notices of proposed assessments are prima facie evidence that the department's claim for unpaid taxes is valid. The taxpayer has the burden of proving that the department incorrectly imposed

the assessment. IC § 6-8.1-5-1(b). Taxpayers are required to keep adequate books and records so that the department can determine the proper tax owed to the state. IC § 6-8.1-5-4.

The taxpayers' books and records were not adequate to allow the department to determine the correct amount of tax. Therefore, the department had no option but to prepare an estimate based upon the best information available. The department estimated the total gross amount of sales in the following manner:

The taxpayer did not have invoices from all vendors, and the dates from invoices provided were not consecutive. Invoices were only provided for the audit periods of 2003 and 2004. For the years of 2003 and 2004 the amount of ham purchased from each invoice (which was sixty pounds) was applied every day of the festival with the exception of the weekends. Observations of the festival prove that the weekends have approximately twice as many customers. Therefore, the amounts for weekend operations were doubled.

An approximate amount of ham purchased allowed for conversion of pounds to ounces. Next, the total amount of ham in ounces was divided by four, which is an approximate amount of meat per the average sandwich. The result gave an approximate number of sandwiches. Per observations and taxpayer the sandwiches are sold at six dollars a sandwich. The approximate number of sandwiches was multiplied by the six dollar cost to result in the total dollar amount of sandwiches.

Observations concluded sandwiches were approximately one half of the gross receipts; therefore the total dollar amount of sandwiches was multiplied by two. This resulted in total amount of sales. The amounts were consistent for each year. Therefore, the amount of gross receipts for 2003 and 2004 was applied to 2002.

The total amount of sales less amounts reported gave additional sales subject to the gross retail tax.

The department notes that, aside from poor record keeping, the audit found evidence of unreported sales and transactions. The taxpayer now argues that the amount originally assessed was too great. The taxpayer suggested that the department could make a better estimate by applying the 2005 total sales amounts to the three years covered by the audit. The taxpayer did maintain 2005 records; the amount of 2005 sales is approximately 40 percent lower than the estimated sales for the tax period. While the Department agrees that the 2005 records *could* provide a reasonable basis for projecting the estimated periods, the department declines to make such a factual determination. The administrative review process is not the forum for making such a numerical determination based solely on taxpayer's unexamined, unchallenged assertion. However, the taxpayer has met its burden of demonstrating that the estimated sales amounts should be reconsidered.

Finding

Subject to a supplementary audit review of the taxpayer's 2005 records and a comparison of those records with the estimated periods, the taxpayer's protest is sustained.

II. Tax Administration- Ten Percent Negligence Penalty

Discussion

The taxpayer protested the imposition of the ten percent (10[percent]) negligence penalty pursuant to IC § 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2(b) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

During the period of the audit, the taxpayer ignored the law and the department's` instructions for the payment of sales tax and maintenance of adequate records. The taxpayer's inattention to these duties resulted in the tax assessment. These breaches of the taxpayer's duty constituted negligence.

Finding

The taxpayer's protest is denied.